

DEC 3 1965

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 4

MARC D. LEH, etc., et al.,

Petitioners,

vs.

GENERAL PETROLEUM CORPORATION,
a corporation, et al.,*Respondents.*On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

Petition for Rehearing

PAUL E. BERMINGHAM,
150 East 42nd St., New York 17, N.Y.HOWARD PAINTER,
811 West Seventh St., Los Angeles, Calif.*Attorneys for General
Petroleum Corporation.*FRANCIS R. KIRKHAM,
WILLIAM E. MUSSMAN,
THOMAS E. HAVEN,
225 Bush St., San Francisco 4, Calif.*Attorneys for Standard Oil
Company of California.*GEORGE W. JANSEN,
110 Laurel Street, San Diego, Calif.*Attorney for Texaco Inc.*JACK E. WOODS,
WILLIAM D. FOOTE,
555 South Flower St., Los Angeles, Calif.CLARK HEGGENESS,
120 Linden Ave., Long Beach, Calif.*Attorneys for Richfield
Oil Corporation.*MOSES LASKY,
RICHARD HAAS,
111 Sutter St., San Francisco 4, Calif.*Attorneys for Union Oil
Company of California.*EDMUND D. BUCKLEY,
4201 Wilshire Blvd., Los Angeles, Calif.WAYNE H. KNIGHT,
550 South Flower St., Los Angeles, Calif.*Attorneys for Tidewater
Oil Company.**Attorneys for Respondents*

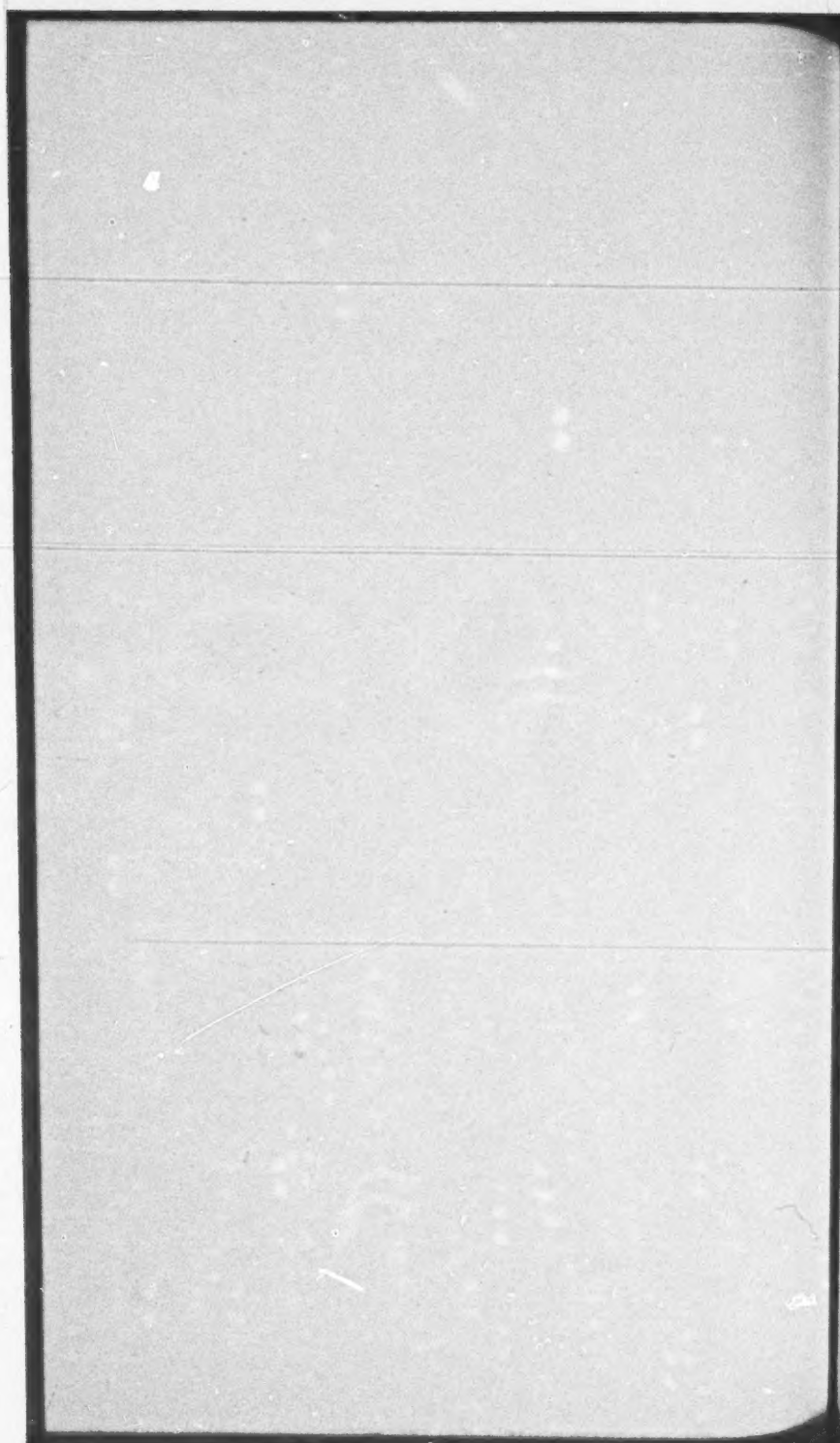
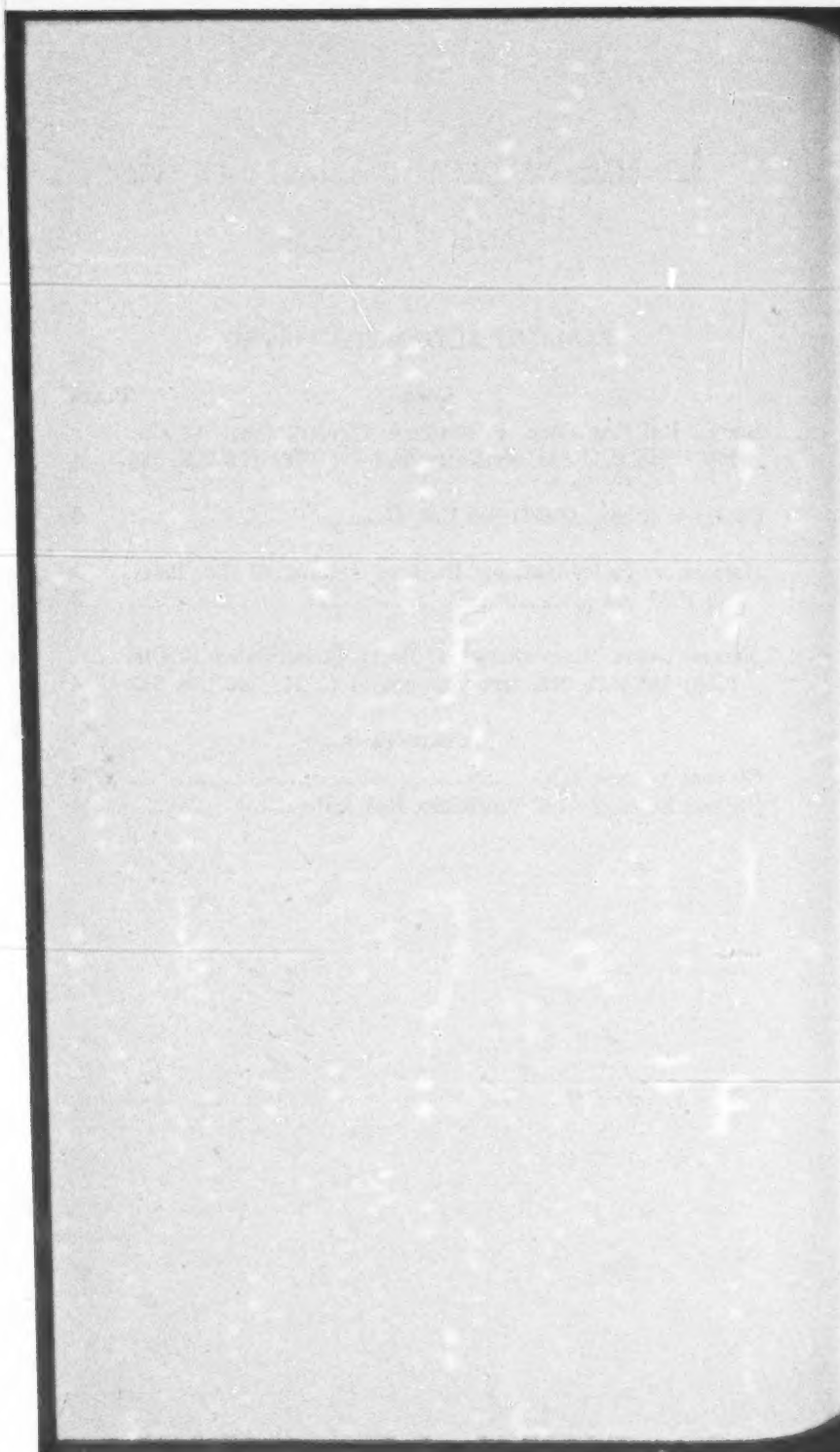


TABLE OF AUTHORITIES CITED

CASES	Pages
Bertha Building Corp. v. National Theatres Corp. (2 Cir. 1957) 248 F.2d 833, certiorari denied (1958) 356 U.S. 936	4
Conley v. Gibson (1957) 355 U.S. 41.....	3
Harman v. Valley National Bank of Arizona (9 Cir. 1964) 339 F.2d 564	3
Suckow Borax Mines Consol. v. Borax Consolidated (9 Cir. 1950) 185 F.2d 196, certiorari denied (1951) 340 U.S. 943	4
STATUTES	
Clayton Act, sec. 5(b).....	2, 4
Federal Rules of Civil Procedure, Rule 56(c).....	4



In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 4

MARC D. LEH, etc., et al.,

Petitioners,

vs.

GENERAL PETROLEUM CORPORATION,
a corporation, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

Petition for Rehearing

Respondents respectfully petition for a rehearing pursuant to Rule 58, on the following grounds:

The Court's opinion states (Slip Op. p. 5):

"Doubtlessly, care must be exercised to insure that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief."

However, the Court later in its opinion states (Slip Op. p. 12):

"In general, consideration of the applicability of § 5 (b) must be limited to a comparison of the two complaints on their face. Obviously suspension of the running of the statute of limitations pending resolution of the government action may not be made to turn on whether the United States is successful in proving the allegations of its complaint. *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 316. *Equally, the availability of § 5 (b) to the private claimant may not be made dependent on his ability to prove his case, however fatal failure may prove to his hopes of success on the merits*" (emphasis added).

This petition is addressed to the underscored sentence in the Court's opinion last quoted. We respectfully submit that this statement may have far-reaching implications not supported by any purpose of Congress and not intended by the Court.

We do not question that one does not go behind the allegations of the Government's complaint. But we ask reconsideration of the holding that one must not "equally" go behind the allegations of the later private plaintiff's complaint.

The statutory language (Clayton Act, sec. 5(b)) is that:

"* * * every private right of action arising under said [the antitrust] laws and based in whole or in part on any matter complained of in said proceeding [by the United States] shall be suspended * * *."

As the Court's opinion observes, the application of section 5(b) requires a comparison. On the one hand, the object of comparison is the "matter complained of" by the Government. The reference here can only be to the Government's complaint. The statute's language plainly so says and one can appreciate Congress's purpose to permit the private

litigant to rely on what the Government asserts without regard to the subsequent disposition of the Government's case.

But the object of comparison on the other hand is the *right of action* on which the private plaintiff would recover but for the statutory bar.

What a private plaintiff may in good faith allege in his complaint is frequently quite different from what he may ultimately prove, even in cases where his proof is sufficient to sustain recovery but for the statutory bar. The Court's language to which this petition is addressed permits, and perhaps even compels, the conclusion that the tolling of the statute hinges on what the pleader has alleged—provided he has acted in good faith—rather than on the reality of his case at the time of proof. Such a rule makes the allegations of the private treble-damage complaint non-traversable for purposes of limitations.

The seriousness of this implication becomes clear when it is recalled that under *Conley v. Gibson* (1957) 355 U.S. 41, the Federal Rules of Civil Procedure permit "notice pleading," whereby the briefest statement in the complaint is sufficient in view of "the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of [the] * * * claim * * *" (355 U.S. 47-48). Indeed, in *Harman v. Valley National Bank of Arizona* (9 Cir. 1964) 339 F.2d 564, the Court of Appeals for the Ninth Circuit has held that even where a complaint failed to state "a triable claim," dismissal of the action, after a plaintiff declined to amend the complaint, was error. The Court reasoned that "it cannot be said with certainty from the face of the present complaint that appellant will be unable to allege a triable claim"

(339 F.2d 567), and it pointed to the availability of pre-trial conference, discovery procedures and motions for a more definite statement. In view of this liberal rule of pleading, a holding that, absent sham, the face of the private treble damage complaint is determinative for the application of section 5(b) could in effect wipe out the statute of limitations.

We know of no other field of law where the bar of the statute rests entirely on the face of the complaint. Everywhere else, if the complaint is not barred on its face, the defense of the statute may be raised by answer and applied according to the proof. In a proper case the bar may be applied by a summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" relating to limitations (Rule 56(c), Federal Rules of Civil Procedure; see, e.g., *Suckow Borax Mines Consol. v. Borax Consolidated* (9 Cir. 1950) 185 F.2d 196, certiorari denied (1951) 340 U.S. 943). Where disposition by summary judgment is not warranted, the bar can yet be applied after plenary trial (e.g., *Bertha Building Corp. v. National Theatres Corp.* (2 Cir. 1957) 248 F.2d 833, 835-836, certiorari denied (1958) 356 U.S. 936).

We respectfully submit that no different rule should be created with respect to section 5(b) of the Clayton Act. Accordingly, we urge the Court, if it adheres to its disposition of this case, to modify its opinion to make clear that even where a complaint in good faith is sufficient to invoke on its face the tolling provision of section 5(b), subsequent developments during pretrial or in the course of trial may show that the "private right of action" is not based, in whole or in part, on any matter complained of

in the Government's complaint, and that the bar of the statute of limitations may then be properly invoked.

Dated: September 30, 1965.

Respectfully submitted,

PAUL E. BERMINGHAM,
HOWARD PAINTER,

*Attorneys for General
Petroleum Corporation.*

FRANCIS R. KIRKHAM,
WILLIAM E. MUSSMAN,
THOMAS E. HAVEN,

*Attorneys for Standard Oil
Company of California.*

GEORGE W. JANSEN,

Attorney for Tezaco Inc.

JACK E. WOODS,
WILLIAM D. FOOTE,
CLARK HEGGENESS,

*Attorneys for Richfield
Oil Corporation.*

MOSES LASKY,
RICHARD HAAS,

*Attorneys for Union Oil
Company of California.*

EDMUND D. BUCKLEY,
WAYNE H. KNIGHT,

*Attorneys for Tidewater
Oil Company.*

By FRANCIS R. KIRKHAM,
Attorneys for Respondents

I certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay.

FRANCIS R. KIRKHAM